



was not a total loss of joint space in the knee. Dr. Wheeler further opined that 50 percent of that rating preexisted the June 26, 2001 accident. Consequently, respondent argues claimant's compensation should be based upon a 17.5 percent impairment attributable to the June 26, 2001 accident.

Conversely, claimant notes that his left knee was asymptomatic before the work-related accident. Although the x-rays taken after the accident revealed a preexisting degenerative condition in his left knee, the claimant argues that all the medical testimony indicates that in the absence of preexisting symptomatology in his left knee, the claimant would not have had a preexisting impairment under the *AMA Guides*<sup>1</sup>. Claimant further argues that the meniscal tear injury aggravated his preexisting asymptomatic degenerative condition which caused an additional impairment and therefore the ALJ's Award should be affirmed. Claimant further argues that he is entitled unauthorized medical compensation and future medical compensation.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Calvin Cowan is the head custodian for Claude Huyck Elementary School. One of claimant's duties is to pick up litter around the school building. On June 26, 2001, he picked up a Styrofoam cup and when he turned to put it in the dumpster he felt a pop in his left knee and fell to the ground. Claimant advised his employer and was provided medical treatment with Occupational Medicine Associates. He was diagnosed with a knee strain and Ibuprofen was recommended for the pain.

A week later the claimant returned for a follow-up visit and an MRI was ordered. The MRI revealed the claimant had a torn medial meniscus and degenerative changes in his left knee. Claimant was then referred to Dr. Robert Murphy, an orthopedic surgeon. Dr. Murphy examined the claimant and ordered x-rays as well as injections. Dr. Murphy diagnosed the claimant with a torn medial meniscus and arthritis. The doctor recommended arthroscopic surgery which was performed on November 2, 2001, to claimant's left knee. Claimant was placed on light duty and then finally returned without restrictions to his full-time job as head custodian.

Claimant testified that he had not had any arthritis, pain, crackling or popping in his left leg and his current problems have developed since his injury. He still experiences

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

stiffness in his left knee as well as difficulties with standing, walking, squatting or kneeling. Claimant continues to have swelling, popping and locking in the knee.

At his attorney's request, the claimant was examined by Dr. Edward J. Prostic on February 10, 2003. Upon examination, Dr. Prostic found the claimant walks with an antalgic gait and shortened stance on the left. Dr. Prostic ordered x-rays of the claimant's knee which revealed "genu varum malalignment with almost complete loss of medial joint space."<sup>2</sup> Dr. Prostic concluded that as a result of the work-related accident on June 26, 2001, the claimant suffered a torn medial meniscus and aggravated a preexisting degenerative joint disease. Based upon the *AMA Guides*, Dr. Prostic later testified the claimant has a 50 percent permanent partial impairment to the left leg.

Dr. Prostic testified that the claimant's previous medical history did not indicate claimant had any previous complaints, symptoms, limitations or restrictions with his left knee. In the absence of any prior complaints or medical treatment for the left knee, Dr. Prostic further opined that claimant did not have any preexisting impairment, as defined by the *AMA Guides*, before the June 26, 2001 accident.

Dr. Wheeler performed a physical examination of claimant on March 27, 2003. Upon examination, the doctor found some tenderness along the medial joint line of the left knee, fluid and crepitus as well as an antalgic gait. After reviewing the July 18, 2001 x-ray films, the doctor determined the claimant had a tricompartmental arthritis in the patella femoral joint. Dr. Wheeler noted claimant had 2 millimeter joint space in the patella femoral junction and 1 millimeter joint space in the medial compartment. She diagnosed the claimant as having left knee pain with moderate to severe degenerative joint disease and status post partial medial meniscectomy. Dr. Wheeler further opined that the degenerative joint disease was not caused by the accidental injury.

Based upon the *AMA Guides*, Dr. Wheeler opined the claimant sustained a 35 percent impairment to the lower extremity. Dr. Wheeler opined that 50 percent of the claimant's 35 percent impairment was considered preexisting and the remaining 50 percent was for an exacerbation of that preexisting condition. Dr. Wheeler agreed that if there was no joint space the appropriate rating would be 50 percent.

Dr. Wheeler agreed that the claimant did not have any symptoms regarding the degenerative joint disease prior to the claimant's accident and, based upon the definitions in the *AMA Guides*, he had neither preexisting impairment nor disability before his accident on June 26, 2001.<sup>3</sup>

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<sup>2</sup> Prostic Depo. at 8.

<sup>3</sup> Wheeler Depo. at 25.

Dr. Theodore L. Sandow Jr., a board certified orthopedic surgeon, was appointed by the ALJ to perform an independent medical examination of claimant. On May 13, 2003, Dr. Sandow performed a physical examination and took claimant's history. Dr. Sandow diagnosed the claimant with a degenerative tear of the left medial meniscus and also degenerative joint disease of the left knee. Dr. Sandow rated claimant's partial medial meniscectomy at 2 percent to the lower extremity. He further determined x-rays revealed a complete loss of medial compartment joint space. Consequently, the doctor rated claimant's lower extremity impairment for the loss of joint space at 50 percent. Dr. Sandow also opined that for the partial medical meniscectomy claimant suffered an additional 2 percent impairment to the left lower extremity.

In response to inquiry from an insurance claims representative Dr. Sandow sent a letter that noted the claimant did have preexisting degenerative joint disease in his left knee prior to the accident on June 26, 2001, and that 50 percent of the 52 permanent partial impairment is due to preexisting osteoarthritis.<sup>4</sup>

Dr. Sandow testified that claimant denied any significant difficulty with either lower extremity. On cross-examination, the doctor agreed that claimant did not have any prior history regarding symptomatology in his left knee. In the absence of any such complaints before the accident, Dr. Sandow agreed claimant did not have any preexisting impairment and the work-related accident made a previously asymptomatic condition become symptomatic.

Q. (By Mr. Martin) Since we're talking about the left knee today -- Doctor, does the incident in which we're here about today, this twisting incident, and I think you said this twisting incident caused further tearing of the degenerative meniscus; is that correct?

A. That's my opinion, yes.

Q. So in other words, he had an event on June 26th of 2001 while in the course of his employment which aggravated a preexisting condition?

A. Yes.

Q. That preexisting condition was asymptomatic?

A. As far as we can determine, yes.

Q. You were asked questions, and I think you have already indicated that you would have to speculate, but you can't say what, if any, symptoms this man would have today had he not had this event of June 26th, 2001?

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<sup>4</sup> Sandow Depo., Ex. 3.

A. That's correct. Many times we take x-rays of patients and they have severe arthritis and they have no symptoms and then we take pictures of people and they have mild arthritis and they have extensive symptoms. Just the findings on x-ray does not tell you what symptoms the patient is going to suffer from.

Q. You would agree, would you not, that the need for the surgery and the symptoms which he now has stem from the event which aggravated that preexisting condition on June 26th, 2001?

A. Yes.<sup>5</sup>

. . .

Q. (By Mr. Martin) Before the accident of June 26th, 2001, in accordance with the definitions in the Guides, he had neither an impairment nor a disability?

MR. ANDERSON: Same objection.

A. That is correct.<sup>6</sup>

Respondent argues that because the joint space loss in claimant's left knee preexisted and was not caused by the work-related accident, claimant should not be compensated for that preexisting condition.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>7</sup>

Drs. Prostic and Wheeler concluded that claimant's accidental injury aggravated the preexisting degenerative condition in his left knee. Although Dr. Sandow noted that the accidental injury did not cause the degenerative condition and the accident merely aggravated the preexisting meniscal tear, on cross-examination he agreed that all of claimant's post-injury symptoms were attributable to the June 26, 2001 accident. Thus, Dr. Sandow also concluded the accident aggravated the preexisting arthritic condition in claimant's left knee.

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<sup>5</sup> Sandow Depo. at 18-19.

<sup>6</sup> Id. at 23.

<sup>7</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

The Board affirms the ALJ's determination that the June 26, 2001 accident aggravated claimant's preexisting degenerative condition in his left knee.

The doctors all agreed that an absence of joint space in the knee would result in a 50 percent functional impairment according to the *AMA Guides*. Upon review of x-rays he ordered of claimant's knee, Dr. Prostic concluded claimant had almost a complete loss of medial joint space. Dr. Wheeler reviewed x-rays taken of claimant's left knee on July 18, 2001, and determined claimant had 2 millimeters of joint space in the patella femoral junction and 1 millimeter of medial joint space. Dr. Sandow reviewed those same x-rays and concluded they revealed a complete loss of the medial compartment joint space. Dr. Sandow also reviewed x-rays of claimant's left knee taken February 10, 2003, which he noted also showed complete loss of medial compartment joint space.

The ALJ concluded that Dr. Sandow's opinion was more persuasive and determined claimant suffered a 52 percent permanent partial functional impairment to the lower leg. The Board agrees and affirms.

It is undisputed that after the June 26, 2001 accident, objective testing revealed claimant suffered from a preexisting degenerative condition and joint space loss in his left knee. But all three doctors who testified in this case ultimately concluded that because claimant's preexisting condition was asymptomatic he did not have a preexisting impairment according to the *AMA Guides*. The Board finds the respondent has failed to meet its burden of proof to establish claimant suffered preexisting impairment in his left knee.

At regular hearing, claimant requested unauthorized medical compensation in the sum of \$510 for an examination of claimant conducted by Dr. Prostic.<sup>8</sup> The ALJ did not address that issue in his Award. At oral argument before the Board claimant requested, without respondent objection, that the Board determine that issue.

K.S.A. 44-510h(b)(2) (Furse 2000) provides:

Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis, or treatment, but the employer shall only be liable for the fees and charges for such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis, or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

The only time Dr. Prostic saw claimant was on February 10, 2003, and no functional impairment rating was contained in the doctor's report. Dr. Prostic took a history from the

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<sup>8</sup> R.H. Trans. at 3.

claimant, reviewed previous medical treatment records, had x-rays taken, and conducted a physical examination of claimant. His bill for those services was \$520.

The Board finds the claimant is entitled to unauthorized medical compensation subject to the statutory maximum upon presentation of itemized billings. The Board further finds claimant is entitled to future medical upon application to and approval by the Director.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated January 23, 2004, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent  
Steven J. Howard, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director